In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 526 of 2001
(Old No. 3273/1984)

Bhopal Singh
S/o Padam Singh,
Resident of Village Khalar,
P.s. Patti, Simohkha,
District- Nainital. ..…. Appellant.

VS

State of Uttaranchal. ……. Respondent.

Sri N.C. Gupta, learned counsel for the appellant.
Sri. Amit Bhatt, learned A.G.A. for the State/Respondent.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.

Dated: 29-06-2005

This appeal was directed against the Judgment dated 17.12.1984, passed by the then II Additional Sessions Judge, Nainital in Sessions Trial No.121/1984. Appellant Bhoopal Singh was held guilty, convicted and sentenced to undergo imprisonment for life under Section 302/34 of I.P.C.

2- Briefly stated the case of the prosecution was that on 19-3-1984 at about 4.00 P.M. in Village Khakarn Patti Simalkhan, Tehsil and District Nainital Trilok Singh deceased went at the Diggi to fetch water. Four accused namely Bhoopal Singh, Shiv Raj Singh, Diwan Singh and Kunwar Singh also reached there. There was previous enmity between the accused and the Trilok Singh deceased. At that time Shiv Raj Singh and Bhoopal Singh armed with guns and the remaining two were then carrying lathis with them. While they were at a distance of 15 to 20 paces from the water reservoir accused kunwar Singh exhorted his companions to kill Trilok Singh. On his exhortation Bhopal Singh and Shiv Raj Singh fired shots by their guns which hit Trilok Singh, who sustained injuries on various parts

of the body, fell down and died at the spot instantaneously. After committing the crime Shiv Raj Singh ran away towards his house while other three accused including Bhoopal Singh fled away towards the house of Kunwar Singh. At that time two minor boys Gopal Singh and Kishan Singh were playing near the water reservoir and one witness Bhupendra was coming from the side from where the accused Trilok Singh had come near the place of the incident. The incident was also seen by Mathura Ram and Channi Ram who were engaged in mason work at the house of Ratan Mani near the place of incident.

3- After the occurrence written report was prepared and was delivered to the Circle Patwari Lok Mani Arya by Harsha Singh. The case was investigated and after holding the inquest on the dead body of Trilok Singh, the same was sent for postmortem which was conducted by Dr. V.K. Chopra on 21-3-1984. On completion of the investigation all the four accused were charge sheeted.

4. On the case being committed to the court of decision by the then Chief Judicial Magistrate, Nainital vide his order dated 5-7-1984, all the four accused were put to trial before the aforementioned II Additional Sessions Judge, Nainital.

5. At the trial, prosecution examined eight witnesses, out of which P.W.1 Mathura Ram, P.W.3 Harsha Singh, P.W.5 Kishan Singh, P.W.6 Gopal Singh and P.W.7 Bhupender Singh were the witnesses of fact. P.W.2 Pitamber was the witness of inquest and P.W.4 Dr. V.K. Chopra was the Medical Officer who performed the post-mortem of dead body of Trilok Singh and proved the post-mortem report prepared by him. P.W.8 Lokmani Arya, the Circle Patwari was the investigating officer of the case. All the four accused including the appellant pleaded no guilty and claimed to be tried.

6. Learned Sessions Judge on the basis of his appreciation of the evidence on record placed reliance mainly on the evidence of Mathura Ram (PW1) and accepted the prosecution version as stated above and went on to hold the appellant alone guilty of the charge under Section 302/34 of the Indian Penal Code, whereas other three

accused were acquitted of the charge framed against them. The appellant was also acquitted of the charge under Section 27 and 30 of the Arms Act.

7. For the disposal of the appeal on merit the lower court record was requisitioned but the same was not made available by the Session Judge, Nainital, on the ground that due to carelessness and negligence of the official concerned the record had been weeded out. The court directed the learned Sessions Judge to have the record reconstructed. The efforts were made but for want of availability of the relevant documents of the prosecution and also the copies of the statements of the witnesses examined at the trial, the learned Session Judge showed his inavailability to have the record reconstructed. In the process the notices were sent to all concerned but none could produce any important document of the case to facilitate the proper reconstruction of the record. It is also significance that one of the defence counsel in the case Sri R. Weeler was no more and other counsel Sri M.C. Joshi as well as the learned counsel Sri K.C. Uperti also could not produce any paper or copy of the statements of the witnesses to effect the reconstruction of the record. We also felt it necessary that it will be just and proper to call upon the complainant of the case namely Harsha Singh Negi to let the court know as to whether or not he possess any document or copies of the statements of the witnesses to facilitate reconstruction of the record, but he also on his appearance and through his affidavit dt. 28-6-2005 filed by the learned AGA reiterated that he was not in possession of any part of the record. Therefore, all concerned with the investigation of the crime and also the trial of the case before the learned Sessions Judge could not be of any help in the reconstruction of the lower court record or any part of it. In a situation like this we are satisfied that the learned Session Judge was rightly not able to reconstruct the lower court record to be sent to the court for effective disposal of this appeal according to law.

8- This is an appeal from conviction under Section 374(2) of the Code of Criminal Procedure (for short ‘Code’) and under Section 386

of the ‘Code’ the primary duty which is case on the appellate court is indicted. The duty case on the appellate court in the appeal from conviction is that the appellate court has to scrutinize the evidence with care to find itself as to whether the evidence of the prosecution is sufficient and reliable to prove the charge levelled against the appellant beyond reasonable doubt. The appeal being continuation of the trial, an effective re-appreciation of the evidence of the prosecution is to be made and the duty case on the appellate court can only be discharged if the lower court record with the statements of the witness of the prosecution is made available before it and not otherwise. As stated above the lower court record having being weeded out due to the negligence of an official of the lower court, who was as is evidence from the record has also been punished after disciplinary inquiry. This court is handicapped and re-appreciation of the evidence of the prosecution, to assess as to whether or not the conviction was based on proper and fair appraisal of the evidence of the prosecution is not possible. That being the situation learned counsel argued that the court has no alternative but to allow the appeal and acquit the appellant of the charge levelled against him because without re-assessing the evidence of the witnesses the finding of guilt of the appellant as recorded by the learned Sessions Judge can not legally be up-held. The learned counsel for the appellant pressed in to service the reported decision of the Division Bench of Allahabad High Court in the matter of Aziz Khan Vs. State of U.P., 1992 (29) ACC 223. That was the appeal from conviction and the lower court was nto made available as the same got burnt on account of fire. The reconstruction of the lower court record was not found feasible and learned judges of the court by adverting to the earlier decisions under similar situations were of the view that since the incident of the case had taken place 14 years back, it will not be desirable to direct retrial as by that time the witnesses may not be available and even otherwise the important facts regarding the incident may have faded from their memory. Therefore the appeal against conviction was allowed and

appellant was acquitted. In the instant case the incident took place in the year 1984 and since more than 21 years have elapsed, it will not be desirable and also proper to direct retrial and the option which had been chosen in the reported cases would be the proper way to dispose of the instant appeal by recording the finding of acquittal for want of availability of lower court record. For the reason aforesaid we are constrained to allow this appeal and set-aside the conviction and sentence awarded against the appellant.

9- The appeal is accordingly allowed. The appellant is acquitted and the conviction and sentence awarded against the appellant under Section 302/34 of I.P.C. is set-aside. He is on bail. His sureties and bail bonds are cancelled and sureties are discharged.

(B.S. Verma, J.) **(Irshad Hussain, J.)**

M.K.